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THE INDIVIDUAL MEMBER'S RIGHT TO RECOVER FOR A DEFAMATION LEVELED AT THE GROUP

MASON C. LEWIS*

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INTRODUCTION

When a defamatory statement is leveled at two or more persons, a question may arise as to the propriety of any one individual maintaining an action. Obviously, the object of the defamation whose reputation has suffered¹ should be the one to recover from the publisher. Two possibilities are immediately evident. The group as an entity may, if certain factors are present,² maintain an action for the damage sustained. This damage is generally measured by the impairment of the ability to accomplish the purpose for which the group was organized.³ The other possibility is that a member of the defamed group will be able to prosecute an action for the harm caused him as an individual. The ability to show the court that he was sufficiently identified by the publication will determine the individual's success.

Under the common law, certain formal pleadings were utilized as separate allegations in a declaration by a plaintiff seeking recovery for defamation. These allegations were generally designated as inducement, innuendo and colloquium.⁴ The question of the plaintiff's identity would theoretically be categorized under the colloquium; however, the

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1. "Defamation is an invasion of the interest in reputation and fair name—the interest in acquiring and retaining and enjoying a reputation as good as one's character warrants." HARPER, TORTS § 235 (1933).

2. See WITTENBERG, DANGEROUS WORDS 209 (1948).

3. *Ibid.*

4. *Inducement*—revealing facts which are not apparent from the face of the publication; *Innuendo*—establishing the defamatory sense of the statement; *Colloquium*—indicating the personal application to the plaintiff. See PROSSER, TORTS 579 (2d ed. 1955). See generally *id.* 579-84.

trend toward greater liberalization in pleading and practice has more or less eliminated the use of the formal pleadings. Generally, the only requirement which now prevails is that it must be able to be shown that the defamation concerned the plaintiff.⁵ This paper will deal with the plaintiff specifically as a member of a defamed group and will attempt to indicate the various factors that the courts have considered significant in arriving at their conclusions as to the sufficiency of the identification.

Typically, the cases are recognizable in four more or less distinct categories, according to the ostensible object of the defamation:⁶

1. Large class or group in its collective name
2. Small class or group in its entirety
3. Less than all of a small class or group
4. Generic collectivity with extrinsic identifying factors.

I. LARGE CLASS OR GROUP DEFAMED IN ITS COLLECTIVE NAME

The courts are fairly uniform in denying recovery to any person who seeks damages simply on the basis that he was a member of a class.⁷ The effect upon the individual may be significant in these cases, but not of that nature recognized as a proper foundation for an action.

Personal humiliation from group slander is not uncommon. When a race, business, profession or nation is publicly slandered and when a member of the slandered group is present and known to others present to be representative of the group, personal humiliation is inevitable. It is not actionable, however.⁸

It has often been said that when the direction of the language is to a large group, "one might as well defame all mankind,"⁹ and since the

5. 33 AM. JUR. *Libel and Slander* § 240 (1941).

6. It is to be assumed that if the publication were expressly directed to an individual, there would be no question as to its actionability.

7. *Crosby v. Time, Inc.*, 245 F.2d 927 (7th Cir. 1958); *Service Parking Corp. v. Washington Times*, 92 F.2d 502 (D.C. Cir. 1937); *Riss & Co. v. Association of American Railroads*, 187 F. Supp. 323 (D.D.C. 1960); *Golson v. Hearst Corp.*, 128 F. Supp. 110 (S.D.N.Y. 1954); *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303 (D.D.C. 1948), *aff'd*, 182 F.2d 377 (D.C. Cir. 1950); *Watts-Wagner v. General Motors Corp.*, 64 F. Supp. 506 (S.D.N.Y. 1945); *Comes v. Cruce*, 85 Ark. 79, 107 S.W. 185 (1908); *Noral v. Hearst Publications, Inc.*, 40 Cal. App. 348, 104 P.2d 860 (1940); *Louisville Times v. Stivers*, 252 Ky. 843, 68 S.W.2d 411 (1934); *Watson v. Detroit Journal Co.*, 143 Mich. 430, 107 N.W. 81 (1906); *Macauley v. Bryan*, 75 Nev. 278, 339 P.2d 377 (1959); *Palmer v. Concord*, 48 N.H. 211 (1868); *Hays v. American Defense Soc'y, Inc.*, 252 N.Y. 266, 169 N.E. 380 (1929); *Feely v. Vitagraph Co. of America*, 184 App. Div. 527, 172 N.Y. Supp. 264 (Sup. Ct. 1918); *Lynch v. Kirby*, 74 Misc. 266, 131 N.Y. Supp. 680 (Sup. Ct. 1911); *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940); *Ewell v. Boutwell*, 138 Va. 402, 121 S.E. 912 (1924); *Knupffer v. London Express Newspaper, Ltd.*, [1944] A.C. 116.

8. *Macauley v. Bryan*, 75 Nev. 278, 282, 339 P.2d 377, 378-79 (1959).

9. PROSSER, *TORTS* 583 (2d ed. 1955). "When a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no

fundamental requirement of a libel or slander is that the words must refer to some ascertained or ascertainable person, and that person be the plaintiff,¹⁰ this requirement not having been met, no action will lie.

In a case where a newspaper article attacked a clan for its feuds carried on with another family, the suit brought by a member of the clan was dismissed on the ground that there was no identification of the plaintiff.¹¹ The court rejected the argument that a wholesale defamer was apparently entitled to greater favor in the law than one who directs his attack to an individual. It reasoned that as the number of the class affected increases, it becomes more difficult for any one of that class to show that the defamatory article was directed at him and presently, it becomes impossible.

Another case,¹² also refusing recovery, this time for the defamation of retailers of Japanese sewing machines, spoke of the way in which the general statements must be viewed which necessarily results in the recognition of their innocuous quality.

Language which would be read seriously if written as to an individual might not be capable of serious application to each member of a large group; that which is general may become vague; that which is specific may become ridiculously extravagant.¹³

The court reflected that when assertions are made with reference to a large number of persons, readers are likely to understand the declarations to be opinions rather than statements of fact.

Upon occasion, when large classes are involved, in finding no personal application, the courts rest the decisions on the ground that the doctrines espoused by the group, rather than the membership, were the targets of the attack.¹⁴

The size of group will generally be considered objectively rather than having the manner of expression control the result, as indicated by the following situations.

In the first case, a newspaper publication charged the United States forces in Virginia with cowardice.¹⁵ Because of the enormous size of the class, no individual member of the Army was permitted to maintain an action. A similar result obtained when a manufacturer

libel, but it must descend to particulars and individuals to make it a libel." *King v. Alme & Nott*, 3 Salk. 224, 91 Eng. Rep. 790 (K.B. 1699).

10. ODGERS, *LIBEL & SLANDER* 123 (6th ed. 1929).

11. *Louisville Times v. Stivers*, 252 Ky. 843, 68 S.W.2d 411 (1934).

12. *Golson v. Hearst Corp.*, 128 F. Supp. 110 (S.D.N.Y. 1954).

13. *Id.* at 112.

14. *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950); *In re Payne's Estate*, 160 Misc. 224, 290 N.Y. Supp. 407 (Surr. Ct. 1936).

15. *Palmer v. Concord*, 48 N.H. 211 (1868).

brought an action on a statement which generally referred to firms engaged in the plaintiff's line of business as "an army of racketeers."¹⁶ In both cases the groups defamed were simply too large to form a foundation for individual recovery. Compare the above decisions with the case of *Chapa v. Abernathy*,¹⁷ in which a posse was referred to as "an army of savages." Notwithstanding the generic designation, the court granted relief on the basis of the limited size of the defamed group.

Especially noteworthy with respect to the size consideration is the recent case of *Fawcett Publications, Inc. v. Morris*.¹⁸ *True Magazine* published an article dealing with the subject of the administration of narcotics to college football players. The report specifically dealt with the Oklahoma University football team of 1956, which was comprised of sixty or seventy members. The plaintiff was a fullback on the 1956 team and apparently well known, and subsequently remained in the public's eye as a professional football player. He was permitted to maintain the action and recovered a judgment for 75,000 dollars, without having once been expressly named in the article. The Oklahoma Supreme Court, in affirming the judgment for the plaintiff, observed that

while there is substantial precedent from other jurisdictions to the effect that a member of a "large group" may not recover in an individual action for a libelous publication unless he is referred to personally, we have found no substantial reason why size alone should be conclusive.¹⁹

As indicated by the *Chapa* case,²⁰ the mere fact that the defamatory publication utilizes a generic term will not necessarily preclude recovery. Circumstances surrounding the publication may clearly pinpoint the attack.²¹ This effect is illustrated by the case which is also notable because it involved the largest group of which a member was permitted to maintain an action.²² In this case, the defamatory lecture generally

16. *Watts-Wagner v. General Motors Corp.*, 64 F. Supp. 506 (S.D.N.Y. 1945).

17. 175 S.W. 166 (Tex. Civ. App. 1915).

18. 377 P.2d 42 (Okla. 1962).

19. *Id.* at 51. The decision in *Fawcett* brings to mind a dictum in an early Michigan case:

[S]uppose in a community where there was but one football team a paper was to publish an article asserting that the game of football was a cruel and brutal sport, which was worthy of the severest condemnation; could it be said that this was a charge that each member of the team was cruel and brutal, for which he could successfully maintain a libel suit against the publisher? We think [that the question] must be answered in the negative. *Watson v. Detroit Journal Co.*, 143 Mich. 430, 440, 107 N.W. 81, 85 (1906).

It is also interesting to relate this statement to the Bryant incident examined at note 55 *infra*.

20. *Supra* note 17.

21. NEWELL, *SLANDER & LIBEL* 259 (2d ed. 1898).

22. *Ortenberg v. Plamondon*, 24 Qué. L. Rev. 69 (1914), 35 CAN. L.T. 262 (1915) (civil law jurisdiction). *Fawcett Publications, Inc. v. Morris*, *supra* note 18, exists as the case that dealt with the largest group in a common-law jurisdiction of which a member was permitted to maintain an action for a defamation leveled at the group.

traduced the Jewish religion but, because there were only seventy-five families of the Jewish faith "in a total population of 80,000 souls," the right to prosecute a suit was granted.²³

II. SMALL CLASS OR GROUP DEFAMED IN ITS ENTIRETY

The next possible situation produces almost equal certainty of result as the one previously discussed. This pattern develops around a defamatory statement which is directed at the entire membership of a small group. The first reported case which dealt with the possibility of an individual member of a defamed group maintaining an action was of this type.²⁴ The caption of the report reads "Action for slander to many not named, but signified." The words upon which the suit was permitted to be maintained were related by the court as, "These defendants, innuendo the plaintiff and the other sixteen defendants are those, that helped to murder [sic] Henry Farrer." The odious effect of the declaration upon each member was recognized by the court when it held that "it was sufficiently laid to entitle every one of the defendants to a several action, as if they had been specially named." Notwithstanding the fact that this case has been questioned as to the accuracy of the report,²⁵ the decisions have recognized the principle established that where the group is small and the language, though not specifically identifying any particular member, embraces the entire group, each person involved may maintain an action.²⁶

Illustrative of this principle is the case of *Reilly v. Curtiss*,²⁷ in

23. *Cf. Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952); *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176 (1909). *But cf. Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796 (1940).

24. *Foxcroft v. Lacy*, Hobart 89, 80 Eng. Rep. 239 (K.B. 1613).

25. *Ryckman v. Delavan*, 25 Wend. 186, 193 (Ct. Err. N.Y. 1840).

26. *Wofford v. Meeks*, 129 Ala. 349, 30 So. 625 (1901); *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290 (1901); *Byers v. Martin*, 2 Colo. 605 (1875); *Story v. Jones*, 52 Ill. App. 112 (1893); *Children v. Shinn*, 168 Iowa 531, 150 N.W. 864 (1915); *Wisner v. Nichols*, 165 Iowa 15, 143 N.W. 1020 (1913); *Commercial Tribune Publishing Co. v. Haines*, 228 Ky. 483, 15 S.W.2d 306 (1929); *Lever v. Daily States Publishing Co.*, 123 La. 594, 49 So. 206 (1909); *Goldborough v. Orem & Johnson*, 103 Md. 671, 64 Atl. 36 (1906); *Welch v. Tribune Publishing Co.*, 83 Mich. 661, 47 N.W. 562 (1890); *Fullerton v. Thompson*, 123 Minn. 136, 143 N.W. 260 (1913); *Palmerlee v. Nottage*, 119 Minn. 351, 138 N.W. 312 (1912); *Reilly v. Curtiss*, 83 N.J.L. 77, 84 Atl. 199 (1912); *Weston v. Commercial Advertisers Ass'n*, 184 N.Y. 479, 66 N.E. 660 (1906); *De Hoyos v. Thornton*, 259 App. Div. 1, 18 N.Y.S.2d 121 (Sup. Ct. 1940); *Maybee v. Fisk*, 42 Barb. 326 (Sup. Ct. N.Y. 1864); *Gidney v. Blake*, 11 Johns 54 (Sup. Ct. N.Y. 1864); *Ryer v. Firemen's Journal Co.*, 11 Daly 251 (C.P. N.Y. 1882); *Carter v. King*, 174 N.C. 549, 94 So. 4 (1917); *Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 159 A.2d 734 (1960); *Wilcox v. Miller*, 4 Leb. County Legal J. 246 (C.P. Pa. 1953); *Chapa v. Abernathy*, 175 S.W. 166 (Tex. Civ. App. 1915); *Fenstermaker v. Tribune Publishing Co.*, 13 Utah 532, 45 Pac. 1097 (1896); *Swearingin v. Parkersburg Sentinel Co.*, 125 W. Va. 731, 26 S.E.2d 209 (1943); *Henacre & Bets v. —*, 1 Keble 525, 83 Eng. Rep. 1091 (K.B. 1675); *Foxcroft v. Lacy*, Hobart 89, 80 Eng. Rep. 239 (K.B. 1613).

27. 83 N.J.L. 77, 84 Atl. 199 (1912).

which the defendant orally accused an election board of being drunk while on duty. In allowing one of the members to maintain an action, the court emphasized this rationale: "A sweeping charge of misconduct, leveled against a public board without exception, necessarily points the finger of condemnation at every member thereof."²⁸

In a case in which a newspaper article charged a family with cruelty towards its child, the head of the family was entitled to recover without any showing that he was specially designated. The court said, "One who publishes matter about a family in its collective capacity assumes the risk of its being libelous as to any member thereof."²⁹

One of the underlying concepts in allowing individual recovery in these cases is that when the entire group is subjected to the charge, the possibility of any one member's innocence is excluded.³⁰ Distinguish this result from that reached when a large group is the object of the attack. In that event, forms of expression such as "every member" or "all of" will generally cause the reader to believe that the manner of reference was used only to achieve greater emphasis rather than to represent a factual account of the entire group's position.³¹

In another light, the form of expression may be significant in dictating the finding that the declaration was directed at the group as a whole. This principle was early recognized in a case where the defendant stated to the plaintiffs' father, "Your daughters are whores."³² The court rejected the argument that no action should lie since there might have been more daughters than the two plaintiffs:

[W]hen words are spoken in the plural number, all may bring actions; but when they are in the singular number, as Your son is a thief, it hath been a doubt long controverted for the uncertainty.³³

The possibility of the defendant relieving himself from liability once having uttered the "plural" defamation was recognized in the early New York case of *Maybee v. Fisk*.³⁴ The defendant attempted to plead that after he had stated to a father that his boys stole the defendant's corn, he added, "I mean your two youngest boys." The court rejected the contention and allowed the oldest son to maintain the action since the jury would have to find that all those who heard the original charge also were aware of the qualifying language.³⁵

28. *Id.* at 78, 84 Atl. at 199.

29. *Fenstermaker v. Tribune Publishing Co.*, 13 Utah 532, 537, 45 Pac. 1097, 1098 (1896).

30. 34 COLUM. L. REV. 1322, 1324 n.17 (1934).

31. *Ibid.*

32. *Henacre & Bets v. —*, 1 Keble 525, 83 Eng. Rep. 1091 (K.B. 1675).

33. *Ibid.*

34. 42 Barb. 326 (Sup. Ct. N.Y. 1864).

35. In responding to the defendant's assertion that he should not be responsible

Finally, it must be noted that there has been denial of recovery to an individual member of a small group even though the group was defamed in its entirety.³⁶ This unusual result may occur when the small group acts by majority vote. The rationale is that the plaintiff may be thought of as a member of the minority and actually have opposed the measure which might have prompted the attack.³⁷

III. DEFAMATION OF LESS THAN ALL OF A SMALL CLASS OR GROUP

A category to which many defamation actions may be relegated is one where the language of the publication refers to a small group, not in its entirety, but only with respect to a part of it.³⁸ This type of case has emerged from the reported decisions in a state of uncertainty as to the particular criteria that will be required for individual recovery. The type of case under discussion assumes that the plaintiff can in no way establish a personal reference to himself as an individual but recovery is nevertheless sought on the basis of his membership in the group. The considerations entertained by the courts in this area will be examined according to the particular complexion of the publication.

A. *Alternative Defamation*

Perhaps the most common situation which presents this problem arises from what has been designated as an "alternative defamation."³⁹ The express language or defamatory implication is directed at one of two or more persons. In a recent case⁴⁰ in which a department store

for the hearing of the bystanders, the court exclaimed, "If he will use edged tools he must see to it that he renders their use innoxious." *Id.* at 336.

36. *Jones v. Modesette*, 151 La. 639, 92 So. 144 (1921).

37. NEWELL, SLANDER & LIBEL 258 (2d ed. 1898). See *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132 (1834).

38. *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Zanker v. Lackey*, 32 Del. 588, 128 Atl. 373 (1925); *Hardy v. Williamson*, 86 Ga. 551, 12 S.E. 874 (1891); *American Broadcasting—Paramount Theaters, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962); *Constitution Publishing Co. v. Leathers*, 48 Ga. App. 329, 172 S.E. 923 (1934); *Latimer v. Chicago Daily News*, 330 Ill. App. 295, 71 N.E.2d 553 (1947); *Harvey v. Coffin*, 5 Ind. (Black.) 566 (1841); *Hyatt v. Lindner*, 133 La. 614, 63 So. 241 (1913); *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132 (1834); *Kenworthy v. Journal Co.*, 117 Mo. App. 327, 93 S.W. 882 (1906); *Montgomery Ward & Co. v. Harland*, 205 Miss. 380, 38 So.2d 771 (1946); *Montgomery Ward & Co. v. Blakely*, 200 Miss. 81, 25 So.2d 585 (1946); *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 25 So.2d 572 (1946); *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592 (1936); *Cohn v. Brecker*, 20 Misc. 2d 329, 192 N.Y.S.2d 877 (Sup. Ct. 1959); *Giraud v. Beach*, 3 N.Y. (E.D. Smith) 337 (C.P. 1854); *Ryckman v. Delavan*, 25 Wend. 186 (Ct. Err. N.Y. 1840); *Blaser v. Krattiger*, 99 Ore. 392, 195 Pac. 359 (1921); *Wright v. Rosenbaum*, 344 S.W.2d 228 (Tex. Civ. App. 1961); *Bull v. Collins*, 54 S.W.2d 870 (Tex. Civ. App. 1932); *Harris v. Santa Fe Townsite Co.*, 58 Tex. Civ. App. 506, 125 S.W. 77 (1910); *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 277 N.W. 177 (1938); *Le Fanu v. Malcomson*, 1 Clark 637, 9 Eng. Rep. 910 (H.L. 1848); *Hughes v. Winter*, 2 Barn. 267, 94 Eng. Rep. 492 (K.B. 1733).

39. *American Broadcasting—Paramount Theaters, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

40. *Wright v. Rosenbaum*, 344 S.W.2d 228 (Tex. Civ. App. 1961).

manager charged four customers with the words, "one of you has stolen this dress," the court denied recovery to one of the four and recognized the majority rule that when slanderous words are directed impersonally against an undesignated portion of a group, no member will be able to maintain an action.

Decisions rendered on this basis have prompted plaintiffs to grasp for straws of identification to support their claims. As an example, in a case where the plaintiff's supervisor exclaimed with reference to three employees, "one of you is a crook," the plaintiff unsuccessfully stressed the fact that the defendant was looking at him when the defamation was uttered.⁴¹

The rationale entertained by the courts in denying recovery was enunciated by the frequently cited opinion of *Bull v. Collins*.⁴² The court there considered language to the effect that "one of you two" was guilty of stealing some money. Denying recovery, the court justified the result on the basis that "the clear implication of the language is that both did not steal it."⁴³

The decisions denying recovery, though in the majority,⁴⁴ have not passed without salient opposition. In a particularly well reasoned opinion⁴⁵ in which the court considered the effect of a statement charging one of three salesclerks with taking money from the register, the stress was properly laid upon those who heard the publication. The onlookers who observed and overheard the heated altercation were in a position to reasonably believe that any one of the three, notwithstanding the alternative charge, would be an employment risk. The court also gave due regard to language which previously had been uttered by the defendant to the effect that all three employees were leaving the establishment with a blot on their records. In allowing recovery to one of the salesclerks,⁴⁶ the court recognized that to rest the decision upon the form in which the defamation was expressed and to disregard the obvious effect upon the hearers

would violate elementary principle of jurisprudence in suffering a wrong to exist without a remedy, and would permit indiscriminating reference to the act of one as a deed to all, instead of letting the odium rest alone upon the guilty person.⁴⁷

The dissenting opinion exhibits the approach taken by those courts

41. *Cohn v. Brecker*, 20 Misc. 2d 329, 192 N.Y.S.2d 877 (Sup. Ct. 1959).

42. 54 S.W.2d 870 (Tex. Civ. App. 1932).

43. *Id.* at 871.

44. PROSSER, TORTS 583 (2d ed. 1955).

45. *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 25 So.2d 572 (1946).

46. Recovery was also granted to the two other salesclerks. *Montgomery Ward & Co. v. Harland*, 205 Miss. 380, 38 So.2d 771 (1946); *Montgomery Ward & Co. v. Blakely*, 200 Miss. 81, 25 So.2d 585 (1946).

47. *Supra* note 45 at 72, 25 So.2d at 580.

which appear to examine words in a vacuum without considering the realistic effect of the publication:

[O]ur English language ought not to be made subject to any such distortion that an assertion that one of you did it, or one or the other of you did it, will mean the same as all of you did it, or every one of you did it.⁴⁸

A subsequent case,⁴⁹ citing the decisions involving the three sales-clerks,⁵⁰ dealt with a rather unique situation which the court characterized as a "defamacast." The publication was made by a televised drama depicting one of two prison guards, who were transporting Al Capone from the Atlanta Federal Penitentiary to Alcatraz, as being guilty of taking a bribe. The court clearly indicated that even if the plaintiff was not sufficiently identified by facts extrinsic to the publication itself, both guards would have had a cause of action. The limitation of "alternative defamation" was apparently rejected outright by the court and the case was submitted for jury determination.

B. Designated Segment

A step beyond the situation examined above, is where instead of "one of" a small group being the language of the defamation, the number attacked is increased though it still does not encompass the entire body. Similar rationales support the decisions in this type of case as in the "alternative defamation" situations and generally, recovery is denied. Cases in this category find the plaintiff alleging that he was a member of the fractional segment of the group made the particular object of the attack.

The case of *Harris v. Sante Fe Townsite Co.*⁵¹ dealt with a publication charging nine women of a community in which only fifteen women resided with the destruction of private property. The court refused to give weight to the plaintiff's prominence in the community and involvement in the movement implicated in the activities which would tend to spotlight her as one of the nine, and denied recovery. Once again, the words were examined with respect to the face of the publication rather than as to the audience before whom it was delivered.

48. *Supra* note 45 at 77, 25 So.2d at 583. *But see*, FLEMING, TORTS 508 (2d ed. 1961), in which the author states, "It has been said, that when defamatory words are spoken impartially in relation of either of two persons, the publication affords no right of action, because it is not certain as to which of them the words were spoken. This seems to be wrong in principle because a slur is thereby cast on the reputation of both."

A possible course of action to be taken when these troublesome situations arise might be to require the defendant to show about whom the statements were made, if not the plaintiff.

49. *American Broadcasting—Paramount Theaters, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

50. *Supra* notes 45 & 46.

51. 58 Tex. Civ. App. 506, 125 S.W. 77 (1910).

Fact patterns have arisen where the defendant refers to a small group and expressly names the few members of the group to whom the defamation is directed. Recovery has been denied to those who were excluded by implication.⁵² The same result obtains in a converse situation. This problem is illustrated by a case⁵³ in which seven witnesses were expressly named but the charge of perjury directed at only three, without designation. Though recovery was denied, the opinion was met by a strong dissent which took the compelling approach of viewing the publication as it would fall upon the community.⁵⁴

C. "Some Of" Declaration

Another method of designation which extends to less than all of the small group takes the form of referring to "some of" the aggregation.⁵⁵ The courts have usually found this type of publication too general for individual recovery,⁵⁶ notwithstanding the persuasiveness of the early English case of *Le Fanu v. Malcomson*,⁵⁷ which permitted an action to be maintained by one factory owner for injury sustained by virtue of a publication which indicated that in some Irish factories, cruelties were practiced. When the court concentrates upon the effect of the publication, as was done in this case,⁵⁸ the right of an individual to maintain an action becomes apparent.⁵⁹

52. *Constitution Publishing Co. v. Leather*, 48 Ga. App. 429, 172 S.E. 923 (1934); *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890 (1960).

53. *Kenworthy v. Journal Co.*, 117 Mo. App. 327, 93 S.W. 882 (1906).

54. It was intended to charge and it did charge that the plaintiff was one of seven persons. Will not such a publication provoke each of the seven to wrath? Will it not tend to expose each to hatred and contempt? Will it not tend to deprive each of public confidence and social intercourse? Suppose seven men are named and three of them are stated to be thieves; will either of the seven be able to obtain employment of trust or confidence? If seven persons are named with the statement that three of them are inflicted with smallpox, would not all seven be avoided? *Id.* at 340, 93 S.W. at 886-87 (dissenting opinion).

55. Perhaps the most recent litigation under this category is a suit brought by Paul Bryant, Alabama football coach, against the Saturday Evening Post. The article alleged to be defamatory is entitled, "College Football Gone Berserk." (Sat. Eve. Post, Oct. 20, 1962, p. 10.) The report severely criticizes the training and tactics used by "some coaches," as being cruel and brutal.

A factor certain to be considered by the court is that though never directly stating that Paul Bryant was responsible for the high incidence of football injuries, the article mentions his name five times in the relatively short account. Being named in a publication other than that part alleged to be defamatory is a factor that has been given judicial consideration. For cases in which this point was argued, though unsuccessfully, see *Crosby v. Time, Inc.*, 245 F.2d 927 (7th Cir. 1958); *Hays v. American Defense Soc'y, Inc.*, 252 N.Y. 266, 169 N.E. 380 (1929).

56. *Zanker v. Lackey*, 32 Del. 588, 128 Atl. 373 (1925); *Giraud v. Beach*, 3 N.Y. (E.D. Smith) 337 (C.P. 1854); *Blaser v. Krattiger*, 99 Ore. 392, 195 Pac. 359 (1921); *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 277 N.W. 177 (1938).

57. 1 Clark 637, 9 Eng. Rep. 910 (H.L. 1848).

58. If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are . . . it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbors as

In modern times, a similarly sophisticated opinion⁶⁰ expressly recognized the conflict which exists in the decisions, when there is involved a defamatory statement leveled at some or less than all of a designated small group.⁶¹ This case simultaneously dealt with three separate groups of employees of the Neiman-Marcus department store in Dallas, who were made the objects of a defamatory narration in the book entitled *U.S.A. Confidential*. The groups were comprised of models, salesmen and saleswomen. A group of nine models who were parties-plaintiff represented the entire contingent of models employed by the store. No motion was made to dismiss the complaint based on the language that *some* of the models were call girls. Out of twenty-five salesmen against whom a charge was directed to the effect that *most* were "fairies," fifteen were permitted to maintain an action. The court said:

An imputation of gross immorality to *some* of a small group casts suspicion upon all, where no attempt is made to exclude the innocent. . . . [I]t is difficult to perceive any legalistic distinction between the statements that "some Neiman models are call girls" and "most of the sales staff are fairies."⁶²

The court did limit the extent to which the actions could be maintained, however, when it denied recovery to thirty saleswomen of a group of 382 who based their complaint on a statement referring to "the salesgirls."

D. *Disjunctive Designation*

A "combination device" is occasionally found to be defamatory in cases which involve small groups. It was previously noted that when the defamation is leveled at an entire small group, an action will generally lie for each member.⁶³ The combination device appears when the statement designates a group in its entirety and then qualifies the

being the parties alluded to . . . it would be unfortunate to find the law in a state which would prevent the party being protected against such libels. *Le Fanu v. Malcomson*, 1 Clark 637, 664, 9 Eng. Rep. 910, 921-22 (H.L. 1848).

59. Concentrating upon the effect of the publication, however, does not necessarily insure recovery since there will be instances where, though the charge be vitriolic, personal application to any identifiable individual in the minds of those who hear the publication, is unlikely. This point was poignantly illustrated by a case in which the defendant came down from her hotel room, stormed into the lounge in which approximately twenty-five men were relaxing and exploded: "Some one has stolen \$1,000 worth of my jewelry from my bedroom, and I know who it is and the son of a bitch sits here in this room." The court, in denying recovery to one of the "loungers," exhibited a somewhat impatient attitude in disposing of the plaintiff's claim. "[U]nless the plaintiff can show that he belongs to that class whose ancestry is ascribed to a canine of the female sex, he cannot sustain an action. . . ." *Blaser v. Krattiger*, 99 Ore. 392, 395, 195 Pac. 359, 360 (1921).

60. *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).

61. *Id.* at 315.

62. *Id.* at 316 n.1.

63. *Supra* note 26.

attack by adding, "or some of them." The use of the disjunctive in these situations has been to no avail for the defendant and recovery has been granted.⁶⁴ It is interesting to note one court's reflection as to the possibility of a boomerang effect upon the publisher:

Nor does it make any difference that the words were put in the disjunctive [since] it may turn out on the trial that the expression "or some of them" was used because the writer did not mean that all were guilty, but that the plaintiff alone, or with others, was guilty.⁶⁵

It should be noted in passing that merely because persons other than the plaintiff may have been equally injured by the same attack, this fact alone is not sufficient to preclude recovery.⁶⁶

A device utilized in a manner not unlike that in the "disjunctive" cases⁶⁷ was evident in *Gross v. Cantor*.⁶⁸ In this case, a well known entertainer published a magazine article severely criticizing all twelve of New York City's radio editors but one, with no indication as to the identity of the excluded individual.⁶⁹ The court espoused a rather liberal doctrine when it declared that the plaintiff need only show that the words refer to several individuals and then it would be a matter for the jury to determine whether there is sufficient personal application to the plaintiff to warrant recovery.⁷⁰

The courts which have granted recovery in this category of defamation, though in the minority,⁷¹ have generally exhibited the more justifiable rationale. Recognizing the subtle implications of the English language, one court noted that "a charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations."⁷² Others who have considered the problem presented by the form in which the defamation was released have criticized the approach taken by most of the courts on the basis that the diversity in the manner of designating the plaintiff may be unjustly determinative of his right to sue.⁷³ A recent case⁷⁴ neatly summed up the

64. *Hardy v. Williamson*, 86 Ga. 551, 12 S.E. 874 (1891); *Hughes v. Winter*, 2 Barn. 267, 94 Eng. Rep. 492 (K.B. 1733).

65. *Hardy v. Williamson*, 86 Ga. 551, 557, 12 S.E. 874, 876 (1891).

66. *NEWELL, SLANDER & LIBEL* 258 (2d ed. 1898).

67. *Supra* note 64.

68. 270 N.Y. 93, 200 N.E. 592 (1936).

69. "There is but one person writing on radio in New York City who has the necessary background, dignity and honesty of purpose." 270 N.Y. at 95, 200 N.E. at 593.

70. "[I]f the words may by any reasonable application, import a charge against several individuals, under some general description or some general name, the plaintiff has the right to go on to trial, and it is for the jury to decide, whether the charge has the personal application averred by the plaintiff." *Gross v. Cantor*, 270 N.Y. 93, 96, 200 N.E. 592, 593 (1936), citing *Ryckman v. Delavan*, 25 Wend. 186, 202 (Ct. Err. N.Y. 1840).

71. *Supra* note 44.

72. *Palmerlee v. Nottage*, 119 Minn. 351, 353, 138 N.W. 312 (1912).

73. *Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 159 A.2d 734 (1960); *Ewell v.*

position championed by those who would deplore balancing the plaintiff's right to maintain an action on the form of expression.

[I]t would indeed be irrational, as well as unconscionable, to permit a publication to escape responsibility under the libel law simply by confining the objects of its defamation to "a number of," "some of," or even to "one of" a relatively small group of persons, all of whom are readily identifiable by recipients of the defamatory matter. To hold otherwise would be to make liability for libel depend upon the form of the defamation rather than its content.⁷⁵

IV. DEFAMATION OF A GENERIC COLLECTIVITY—SIGNIFICANCE OF EXTRINSIC FACTORS

The final group of cases defies precise categorization. Generally, the publication involved utilizes a generic term for the object of its attack. The defamation also may actually be directed at a large collectivity, but in either case, because of certain extrinsic factors, it may be possible for the plaintiff to be sufficiently identified to enable the case to be heard by the jury.

The general approach involves a two-step process.⁷⁶ First, a question of law must be disposed of by the court as to whether the publication *could* be understood to have personal application to the plaintiff. The second aspect of the process, assuming that the court ruled affirmatively on the first, contemplates the submission of the case to the jury for the determination of whether the publication *was* reasonably understood by third-parties to refer to the plaintiff. As with the previous areas considered, the following discussion will generally treat the question of law which determines whether the plaintiff can even maintain his action.

A. *Membership in Class*

A fundamental factor is that the plaintiff must first establish that he was a member of the collectivity defamed, before recovery will even be considered.⁷⁷ This prerequisite may seem almost too basic to require mention but plaintiffs have occasionally been stopped at this point.

In one instance, the owner of an auto body repair shop sought recovery for defamatory language charging the business with illegal

Boutwell, 138 Va. 402, 121 S.E. 912 (1924); Wilner, *The Civil Liability Aspects of Defamation Against a Collectivity*, 90 U. PA. L. REV. 414 (1942).

74. *Farrell v. Triangle Publications, Inc.*, *supra* note 73.

75. *Id.* at 105, 159 A.2d at 737.

76. *Knupffer v. London Express Newspaper, Ltd.*, [1944] A.C. 116, 121; *GATLEY, LIBEL & SLANDER* 121 (4th ed. 1953).

77. *PROSSER, TORTS* 583 (2d ed. 1955). See the court's statement in *Blaser v. Krattiger*, *supra* note 59.

operations. The account expressly referred to two employees of the firm as the prime suspects. Apparently on the basis that the defamation was directed solely at the group comprised of the two employees named, the court dismissed the action brought by the owner even though the evidence was overwhelming that customers of the body shop believed the charge to have been inclusive of the plaintiff.⁷⁸

Another case in this area exhibits an unusual twist. A publication was released which charged that certain designated practitioners, including osteopaths, neuropaths and chiropractors, would be undesirable tenants of a professional building. The plaintiff, a licensed medical doctor was denied the right to maintain the suit on the basis of his own allegation declaring that he was a "reputable physician."⁷⁹ As the court explained, "He has therefore pleaded himself out of court"⁸⁰

A final note on the point of effectively alleging membership deals with the time at which the association with the group is significant. Generally, since the cause of action accrues upon publication, the plaintiff will have to show that he was a member at that point in time. If the plaintiff disassociated himself with the group prior to the publication, he nevertheless may still be in a position to recover if the membership continued up to a time shortly before the defamation was issued. How much before issuance will depend upon the nature of the publication. If the defamatory statements were carried in a newspaper, membership must be fairly contemporaneous; if a book was the vehicle, the period is extended. Reasonably certain, however, is that those who join the group after the publication will not be permitted to sue, on the basis that a contrary result would encourage persons to join the defamed group in order to acquire an interest in the litigation. Of course, if the publication itself refers to a particular time about which the statements were made, the date of reference will control.⁸¹

B. Pictorial Identification

A factor which has been given significant consideration in the decisions concerned with publications referring to large classes, is

78. *Newspapers, Inc. v. Matthews*, 161 Tex. 284, 339 S.W.2d 890 (1960). The majority considered the effect of the defamatory statements which were directed at the Texas Body Shop, by name. The court strictly construed the libel statute as precluding an action for the libel of a business. The dissenting opinion appeared to take a more realistic approach by recognizing that the defamation of the business was substantially the defamation of the owner. "Defamatory statements with reference to a business which would be libelous if directed at a named individual are undoubtedly libelous of the owner of the business. If it were not so a business could be destroyed and its owner ruined financially by defamatory publications which referred only to the business by name." *Id.* at 291, 339 S.W.2d at 895. Compare *Young v. New Mexico Broadcasting Co.*, 60 N.M. 475, 292 P.2d 776 (1956), which allowed recovery to a silent partner of a television service concern.

79. *Dunlap v. Sundberg*, 55 Wash. 609, 104 Pac. 830 (1909). Compare *Lathrop v. Sundberg*, 55 Wash. 444, 104 Pac. 176 (1909), in which an osteopath was permitted to maintain an action.

80. *Dunlap v. Sundberg*, 55 Wash. 609, 614, 104 Pac. 830, 832 (1909).

81. 69 HARV. L. REV. 875, 895 n.120 (1956).

pictorial identification. The results are not surprising when cognizance is taken of the fact that the duplicated image of an individual is probably the most precise method of identification possible, whether it be by caricature⁸² or photograph.⁸³ Of course, when recovery is to be granted, it is assumed that the reproduction is not only a sufficient likeness but also, of a sufficient portion of the plaintiff to make identification possible. An action was dismissed when the court found as being insufficiently descriptive of the plaintiff, an illustration depicting the hands, a leg and a foot of a vivisectionist, the class of which was attacked as being animal torturers.⁸⁴

C. *Similarity of Names*

Another point which has been considered as determinative in identifying the plaintiff is the similarity of the individual's name with the one expressly referred to in the publication. When a newspaper article charged Dupont Engineering Co. and "allied concerns" with conspiracy to defraud the government, the unassociated firm of E. I. Du Pont de Nemours and Co. was permitted to maintain an action.⁸⁵

D. *Circulation of Publication*

Finally, one must look to the vehicle of the publication as it might have significance with respect to concentrating the defamation upon the particular plaintiff. When the statements receive a wide circulation and the object of the attack is of a general nature, individual recovery will usually be precluded under the settled concept relating to a large class defamed in its collective name.⁸⁶ However, an interesting argument can be raised when the circulation is severely limited, as in the case of a small town newspaper.⁸⁷ Even though a generic class—such as correspondence schools⁸⁸ is made the object of the attack, if there is only one enterprise of that kind in the town in which the newspaper is circulated, the impact of the publication becomes apparent.⁸⁹

As indicated by the above discussion, the courts have been rather erratic in dealing with the type of publication which is ostensibly directed at a large class but where it is not impossible or even unreasonable to perceive the individual application. The results may, as they have in the past, require *ad hoc* considerations so that the courts will be able to entertain any and all unique factual situations which may be deter-

82. *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132 (1834).

83. *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948).

84. *Brewer v. Hearst Publishing Co.*, 185 F.2d 846 (7th Cir. 1950).

85. *E. I. Du Pont de Nemours & Co. v. Nashville Banner Publishing Co.*, 12 F.2d 231 (6th Cir. 1926).

86. *Supra* note 7.

87. *International Text-Book Co. v. Leader Printing Co.*, 189 Fed. 86 (N.D. Ohio 1910).

88. *Ibid.*

89. See *Marr v. Putnam*, 196 Ore. 1, 246 P.2d 509 (1952).

minative of the question of sufficient identification. The more realistic approach was long ago enunciated by Lord Campbell in the leading case of *Le Fanu v. Malcomson*.⁹⁰

[W]hether he is described by a pretended description of a class of which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done if his name and christian name were ten times repeated.⁹¹

V. PUBLICATION TO THIRD PARTIES

At this point, since the effect of the publication on the third-party recipients has been justifiably emphasized, that subject will be given a cursory examination as it relates to the identification issue. This consideration becomes particularly significant in the second aspect of the two-step process mentioned earlier,⁹² with respect to the question of fact as to whether third-parties *did* understand the publication to refer to the plaintiff.

The plaintiff who seeks individual recovery in the group defamation cases will generally deem himself as knowing that the defamatory language was intended to be directed at him, notwithstanding the general terms employed. Further, he may even be in a position to prove that the defendant specifically intended to reflect upon the plaintiff's character when the publication was issued.⁹³ However, neither of the above factors, even if capable of substantiation by the plaintiff, would be determinative. This position was expressly recognized by the court in the case of *Simpson v. Steen*.⁹⁴

It is not sufficient that the plaintiff knows he was the subject of the article or that the defendant knew this when he was writing, but it must appear that third-parties must have reasonably understood that the article was written of and concerning the plaintiff.⁹⁵

Testimony of those who were recipients of the publication will be required to support the contention that it was understood that the

90. 1 Clark 637, 9 Eng. Rep. 910 (H.L. 1848).

91. *Id.* at 668, 9 Eng. Rep. at 923.

92. *Supra* note 76, and accompanying text.

93. See *Levert v. Daily States Publishing Co.*, 123 La. 594, 49 So. 206 (1909). The *Levert* case indicates that though an action will not be precluded because the defendant was not aware of the plaintiff's membership in the group defamed, the fact may be considered as a mitigating circumstance. *Id.* at 610, 49 So. at 211. *But see*, ODGERS, LIBEL & SLANDER (6th ed. 1929), in which the author states, "[The defendant] cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. . . . His remedy is to abstain from defamatory words." *Id.* at 128, citing *Houlton & Co. v. Jones*, [1910] A.C. 20, 23, 24.

94. 127 F. Supp. 132 (D. Utah 1954).

95. *Id.* at 137-38.

attack was directed at the plaintiff.⁹⁶ An evidentiary problem is encountered at this stage in the form of the opinion rule,⁹⁷ inasmuch as the recipients will, in effect, be testifying that they were of the opinion that the publication referred to the plaintiff. However, as in other areas of the law, expert testimony may be employed to circumvent this barrier, as one of the recognized exceptions to the rule.⁹⁸

CONCLUSION

An exhaustive examination of those cases dealing with the particular problem of individual recovery on the basis of the defamation leveled at a group, reveals an underlying reluctance exhibited by the courts in permitting the maintenance of an action by one of the members. Basically, this tendency would seem to be founded upon the preference which has traditionally been given to the freedom of discussion.⁹⁹ The principle was early recognized in the case of *Ryckman v. Delavan*:¹⁰⁰

It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation.¹⁰¹

Another rationale often discernible is that to permit individual recovery would contravene the public policy against entertaining a multiplicity of suits.¹⁰² This position, however, was cogently attacked in a dissenting opinion by Justice Van Ness of the New York Court of Appeals, in which he undermined the logic in allowing a greater number of wrongs to afford a lesser degree of liability.¹⁰³

96. NEWELL, SLANDER & LIBEL 259 (2d ed. 1898).

97. "A somewhat ambiguous and much relaxed rule of evidence is that witnesses shall testify to facts without stating their impressions, conclusions or opinions." 2 JONES, EVIDENCE § 403 (5th ed. 1958).

98. The apparent basis of the exception is that where defamatory material fails to identify the plaintiff by name, a witness who has personal acquaintanceship with the parties and knowledge of the meaning of identifying terms used and circumstances referred to, is in a proper sense an expert whose opinion as to the identifying effect of the terms and circumstances may be brought to the aid of the jury. Such a witness may make an inference which the jury itself, for lack of special knowledge, could not make. *Service Parking Corp. v. Washington Times*, 92 F.2d 502, 504 (D.C. Cir. 1937).

99. See *Service Parking Corp. v. Washington Times*, 92 F.2d 502 (D.C. Cir. 1937); FLEMING, TORTS 507 (2d ed. 1961).

100. 25 Wend. 186 (Ct. Err. N.Y. 1840).

101. *Id.* at 199 (dictum).

102. *Sumner v. Buel*, 12 Johns 475 (N.Y. 1815); 34 COLUM. L. REV. 1322 (1934).

103. I cannot assent to the idea, that the number of persons who may be libelled, affords the rule to determine whether or not an action will lie. The libeller who calumniates a number of persons, by name, is liable to an action by each; and in such a case, he would hardly be allowed to say . . . that, because he had exposed himself to so many actions, he ought not, therefore, to be punished at all. If such a rule should be adopted, the calumniator who assails and reviles a great number of individuals in the same malicious publication, will escape; while the less guilty

Since the gravamen of a defamation action lies in the harm caused to the plaintiff's reputation, a realistic approach would recognize that though derogatory declarations are directed at a group, injury to an individual's reputation may result. The size of the group and the other various factual circumstances that have manifested their presence in the determinative considerations of the reported decisions, should be relegated to their proper perspective with reference to and in subordination of, the ultimate proposition—the intensity of the suspicion cast upon the plaintiff.

It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class.¹⁰⁴

and less hardy slanderer, who had traduced the character of a single man only, shall be punished. *Sumner v. Buel*, 12 Johns 475, 481 (N.Y. 1815) (dissenting opinion).

104. *Knupffer v. London Express Newspaper, Ltd.*, [1944] A.C. 116, 122 (Lord Atkin, dissenting).